Kho Tian Boo v Tengku Ibrahim Petra bin Tengku Indra Petra

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22NCC-49 OF 2010
MOHAMAD ARIFF J
11 JANUARY 2013

Contract — Sale and purchase of shares — Transfer of shares — Whether price for shares fully paid — Shares not transferred into purchaser's name — Whether vendor held shares as constructive trustee for purchaser — Whether purchaser's failure to complete cross-examination fatal to proof of his case

The plaintiff had entered into a sale and purchase agreement ('SPA') with the defendant to buy 400,000 of the latter's shares in a private limited company, PRSB. The plaintiff claimed the defendant failed to transfer the shares to him despite his having paid the full purchase price for them. The defendant denied the purchase price had been paid. PRSB underwent a listing exercise resulting in the PRSB shares being converted into the shares of the listed vehicle, PBB. In his instant action the plaintiff claimed for the transfer to him of the equivalent worth of PBB shares (together with additions thereon through rights and bonus issues and a share split exercise) registered in the name of the defendant, his agents or nominees, on the basis they held the shares for him on trust. Apart from claiming damages, the plaintiff, inter alia, also prayed that the defendant be ordered to account for all dividends, bonuses, rights issues and/or profits the defendant had obtained from the shares from the date of the SPA until the date of judgment. During the trial, the plaintiff was unable to complete being cross-examined due to severe depressive disorder causing the defendant to move the court to wholly disregard the plaintiff's testimony.

Held, allowing the claim:

(1) The evidence in favour of the plaintiff's case was overwhelming to the extent that the failure to complete the cross-examination of the plaintiff could not be regarded as fatal on the question of proof in this case (see para 28)

(2) The defendant had not challenged the authenticity of the SPA. In cl 5.2 thereof, the defendant expressly acknowledged that consideration for the shares had been paid in full. Clause 5.2 could not be contradicted or varied by extrinsic evidence. It would require fairly convincing evidence to disprove the admission of payment in the agreement itself and displace the applicability of ss 91 and 92 of the Evidence Act 1950. The defendant had not sufficiently provided such proof (see para 28).

(3) There was evidence the defendant personally wrote a letter to the plaintiff

acknowledging that he was still in possession of the 400,000 PRSB shares the plaintiff had purchased from him and that he would hold on to the shares until the plaintiff instructed him to transfer the shares to his name. In cross-examination the defendant agreed that he held the shares as trustee for the plaintiff. There was also express acknowledgement of a trust relationship when the defendant issued a personal cheque to the plaintiff for payment of dividend on the shares (see para 29).

(4) Justice would not be served if the plaintiff's testimony was to be totally disregarded because the cross-examination of him was incomplete. The plaintiff's testimony could not be regarded as 'not so far advanced'. His examination-in-chief was complete and although the defence did not have the full benefit of testing the veracity of his evidence or to attack his credit, the case was essentially based on the laws of contract and trust and, as such, over and above the oral testimony, the case ultimately depended on the strength of the documentary evidence before the court (see para 8).

[Bahasa Malaysia summary

Plaintif memasuki perjanjian jual dan beli ('SPA') dengan defendan untuk membeli 400,000 saham defendan di dalam syarikat sendirian berhad, PRSB. Plaintif mendakwa defendan gagal untuk memindahkan saham-saham tersebut kepadanya walaupun dia telah membayar penuh harga belian untuk saham-saham tersebut. Defendan menafikan yang harga belian telah dibayar. PRSB menjalani pelaksanaan penyenaraian mengakibatkan saham-saham PRSB ditukarkan kepada saham-saham syarikat yang disenaraikan, PBB. Dalam tindakannya ini plaintif menuntut untuk pemindahan kepadanya jumlah bersamaan saham-saham PBB (bersama dengan tambahan di atasnya melalui terbitan-terbitan hak dan bonus dan pelaksanaan pembahagian saham) yang didaftarkan di dalam nama defendan, ejennya atau penama, atas asas mereka memegang saham-saham tersebut untuknya atas amanah. Selain daripada menuntut ganti rugi, plaintif, antara lain, juga memohon bahawa defendan diperintahkan untuk mengira untuk kesemua dividen, bonus, hak terbitan dan/atau keuntungan yang defendan perolehi daripada saham-saham dari tarikh SPA hingga tarikh penghakiman. Semasa perbicaraan, pemeriksaan balas plaintif tidak lengkap akibat gangguan kemurungan besar menyebabkan defendan memohon kepada mahkamah untuk tidak mengendahkan keterangan plaintif.

Diputuskan, membenarkan tuntutan:

(1) Keterangan yang memihak kes plaintif adalah sangat kukuh sehingga kegagalan untuk melengkapkan pemeriksaan balas terhadap plaintif tidak boleh dianggap sebagai gagal atas persoalan bukti di dalam kes ini (lihat perenggan 28).

(2) Defendan tidak mencabar ketulenan SPA. Dalam klausa 5.2 perjanjian, defendan dengan nyata mengakui bahawa balasan untuk saham-saham tersebut telah dibayar dengan penuh. Klausa 5.2 tidak boleh bertentangan atau berubah atas keterangan ekstrinsik. Ia akan memerlukan keterangan yang boleh dipercayai untuk membantah pengakuan bayaran di dalam perjanjian itu sendiri dan menggantikan keterterapan ss 91 dan 92 Akta Keterangan 1950. Defendan tidak dengan mencukupi memberikan bukti sedemikian (lihat perenggan 28).

(3) Terdapat keterangan bahawa defendan secara peribadi menulis surat kepada plaintif mengakui dia memiliki 400,000 saham-saham PRSB yang dibeli oleh plaintif daripadanya dan bahawa dia akan memegang kepada saham-saham tersebut sehingga plaintif memberi arahan kepadanya untuk memindahkan saham-saham tersebut kepada namanya. Dalam pemeriksaan balas defendan bersetuju bahawa dia memegang saham-saham tersebut sebagai pemegang amanah untuk plaintif. Terdapat juga pengakuan nyata hubungan amanah apabila defendan mengeluarkan cek peribadi kepada plaintif untuk bayaran dividen atas saham-saham tersebut (lihat perenggan 29).

(4) Keadilan tidak akan dilaksanakan jika keterangan plaintif tidak diambil kira secara keseluruhan kerana pemeriksaan balasnya tidak lengkap. Keterangan plaintif tidak boleh dianggap sebagai 'not so far advanced'. Pemeriksaan utama plaintif adalah lengkap dan walaupun pembelaan tidak mempunyai peluang penuh menguji kebenaran keterangannya atau untuk menyerang kreditnya, kes tersebut secara dasarnya berasaskan undang-undang kontrak dan amanah dan, oleh itu, selain keterangan lisan, kes tersebut bergantung secara asasnya atas kekuatan keterangan dokumentar di hadapan mahkamah (lihat perenggan 8).]

Cases referred to

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61; [1997] 2 CLJ 153, FC (refd)

Ganam d/o Rajamany v Somoo s/o Sinnah [1984] 2 MLJ 290, FC (refd)

Lin Ah Moy v Lee Cheng Hor & Ors [1970] 2 MLJ 99, FC (refd)

Lim Siew v Chin Whye Thiam [1995] MLJU 308; [1995] 2 CLJ 833, HC (refd)

Macronet Sdn Bhd v RHB Bank Sdn Bhd [2002] 3 MLJ 11, HC (refd)

Takako Sakao(f) v Ng Pek Yuen(f) & Anor(No 2) [2010] 2 MLJ 181; [2010] 1 CLJ 381, FC (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 101, 103

KK Wong (Karen Lee, Ng S Seng, Ariani Arda Bakri, Raja Syarafina, KT Ng and Chris Lim with him) (Chris Lim Ting & Partners) for the plaintiff.

Ranjit Singh (Yeoh Cho Kheong and Adeline Yew with him) (Ranjit Singh & Yeoh) for the defendant.

Mohamad Ariff J:

INTRODUCTION

[1] The essential facts of this case can be stated quite briefly. The case itself has been heard as a full trial before this court during which five witnesses were called by the plaintiff (including an expert medical witness to testify on the plaintiff's mental condition to continue the cross-examination) and three witnesses were called by the defendant. The crux of the case involves the sale and purchase of 400,000 shares in a private limited company called Petra Resources Sdn Bhd ('PRSB') by a sale and purchase agreement dated 27 December 1999 entered into between the plaintiff and the defendant. The total consideration for the shares under the SPA was RM1,920,000. The plaintiff alleged he had paid for the shares in full. PRSB had undergone a listing exercise whereby the 400,000 PRSB shares had been 'exchanged' for shares in the listed vehicle, identified as Petra Perdana Bhd ('PPB'). By its pleaded case, the plaintiff is claiming a total of 10,006,320 PPB shares which would include the total number of 'exchanged' shares together with additions thereon through rights, bonus issues and share splits by PPB.

THE RELIEFS PRAYED

[2] The plaintiff's prayers in the amended statement of claim and, as analysed in the course of submission, include the following:

(a) a declaration that:

(i) 10,006,320 shares in Perdana Petroleum Bhd (the new name of Petra Perdana Bhd) ('PPB'); or

(ii) 3.36% of PPB's issued share capital — registered in the name of the defendant, the defendant's agent and/or nominee ('shares') is held by the defendant as trustee for the plaintiff;

(b) a mandatory order for the defendant to transfer to the plaintiff within seven days from the date of this honourable court's judgment …

(i) the shares; and/or

(ii) any amount of PPS shares registered in the name of the defendant, the defendant's agent and/or nominees which belongs to the plaintiff ('other shares');

(c) a mandatory order for the defendant to affirm an affidavit within seven days from the date of judgment to account for and to disclose in detail, all

dividends, bonuses, rights issues and/or profits obtained by the defendant resulting from the shares and/or other shares from 27 December 1999 until the date of judgment;

(d) an order to the defendant to pay to the plaintiff, damages which are to be assessed by this honourable court's registrar ('damages');

(e) interest of 4% on the damages to be paid by the defendant to the plaintiff from date of filing of the suit, 12 January 2010 until the date of judgment ('pre-assessment interest');

(f) interest of 4% on both the damages and pre-assessment interest to be paid from date of judgment until the date of full satisfaction of the damages and pre-assessment interest;

(g) costs to be paid by the defendant to plaintiff on a solicitor — client indemnity basis because of the defendant's breach of trust …; and

(h) other relief as this honourable court sees just and fit.

[3] As can be appreciated from these prayers, the relief being claimed is broad and founded on contract, resulting/constructive trust and unjust enrichment. There is also a claim for damages to be assessed on top of the claim for a mandatory order that the defendant swear an affidavit to disclose in detail all benefits he had received from the shares from the date of the SPA until the date of the judgment of this court.

THE MAIN SUBMISSIONS

[4] On the evidence, the plaintiff claims he has a strong and clear case. The terms of the SPA are clear, there is clear evidence of payment of the consideration and the defendant himself has admitted he holds the shares on trust for the plaintiff. The defendant, whilst not denying he executed the SPA, questions whether the consideration had been paid. In the course of this trial the defendant has adduced in evidence fairly voluminous original accounting records in an attempt to demonstrate that there was no payment made for the shares by the plaintiff. In contrast, the plaintiff has produced exh P12 (p 12 of PBD1), which is a bank draft issued by Eon Finance Bhd a day after the date of the SPA and made payable in the name of Petra Resources Sdn Bhd for the exact sum of RM1,920,000, ie the purchase consideration. The plaintiff contends the payment of the purchase consideration was made to Petra Resources Sdn Bhd upon the express instruction of the defendant so as to settle part of the advances the defendant had taken from the company.

[5] Relying on the aforesaid accounting records, the defendant takes the position that this bank draft was in fact payment made by the plaintiff himself to the company for advances the plaintiff himself took from the company. It

was in this regard that there was an extended cross-examination of DW2 (Soon Fook Kian) on the accounting documents (principally payment vouchers, journal vouchers, general ledgers and cash transaction listings). See DBD2 to DBD33. In this regard, the accounting records produced by the defendant are alleged to contradict those produced by the plaintiff. It must however be noted at the outset that these accounting records, although admitted as exhibits, were prepared by one Miss Tan Wee Sie, or under her supervision. She was the senior accounts supervisor of PPB from 20 November 1991–31 July 2006. At the outset of this trial, counsel for the plaintiff indicated that the plaintiff would be calling Miss Tan as a witness but ultimately decided not to call her. The defendant, on his part, and despite producing the voluminous accounting records, then submitted to have been recently discovered from the storeroom of PPB, also did not see it fit to subpoena Miss Tan to testify on the contents of these documents, so far as they are relevant to support the defendant's case.

THE INCOMPLETE CROSS-EXAMINATION OF PW1

[6] At the conclusion of the trial, this court has to rely on the testimony of only two principal witnesses for each side on the main issues to supplement the documentary evidence. For the plaintiff, the plaintiff himself gave evidence (without completing the cross-examination on medical grounds, ie severe depressive disorder) together with Soon ('PW2'). For the defendant, the defendant gave evidence as DW2, together with the plaintiff's son-in-law, Robert Lee Mee Jiong ('DW3'). On the matter of the incomplete testimony of trie plaintiff, a *voir dire* was conducted early in the trial to determine the medical fitness of the plaintiff to continue giving oral testimony and to decide on the issue whether he could be compelled to be subject to continued cross-examination by the defendant's counsel. I have provided my earlier written grounds for my decision which held that the plaintiff could not be compelled to continue with cross-examination, although I left the issue of what weight to be attached to his incomplete testimony open for both counsel to submit. I had then, inter alia, referred to the principles laid down by the Federal Court in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 2 CLJ 153, and in so doing I had concluded:

> The weight to be attached to (the plaintiff's) testimony will be a matter for this court's assessment, I might add after hearing submissions by both counsel. The available authorities even go so far as to establish the principle that if the testimony is not so far advanced, the court might even disregard the testimony. It will be up to counsel to persuade this court on the weight the court should attach to the testimony, or for it to be disregarded altogether.

[7] In this regard, counsel for the defendant has strongly urged this court to disregard the plaintiff's testimony altogether since the cross-examination had hardly started and there were many crucial areas in his witness statement that

had not been subject to cross-examination when the plaintiff suffered the severe depressive disorder, in short, the defendant's counsel argued that they would have put the defendant's case across to the plaintiff and in so doing the plaintiff could very well have conceded to some or all of the defendant's case. As for counsel for the plaintiff, it was argued that in the circumstances there was no suppression of material evidence by the plaintiff since his medical condition prevented him from continuing with his testimony. It was further submitted that if the court were minded to draw such an adverse inference, such adverse inference would be rebutted by the overwhelming evidence in this case in favour of the plaintiff.

THE COURT'S FINDING ON ISSUE OF INCOMPLETE CROSS-EXAMINATION

[8] Having considered the submissions, and evaluated them against the evidence (particularly the documentary evidence), I am not of the view that justice will be served if the plaintiff's testimony were to be totally disregarded. It will be wrong to do so since the testimony given cannot be regarded as 'not so far advanced'. The examination-in-chief itself is complete, although counsel for the defendant has not had the full benefit of testing the veracity of the plaintiff's evidence or to attack his credit. I reminded myself that this is a case based essentially on contract and the law of trust, and as such, over and above the oral testimony, the documentary evidence must be regarded as highly significant. On balance, the incomplete testimony of the plaintiff should be given its due weight against the totality of the evidence and the full circumstances of the case. This case therefore ultimately will depend on the strength of the documentary evidence available before this court and on issues of whether the plaintiff has, despite not having completed his testimony, succeeded in establishing his case on a balance of probabilities on the totality of the evidence. It is also fairly well accepted on the authorities that a plaintiff's case can be proven not merely on the evidence tendered by the plaintiff but also strengthened and proven by the evidence of the opposing party. See eg *Lim Siew v Chin Whye Thiam* [1995] MLJU 308; [1995] 2 CLJ 833. At the end of the day, the court must weigh, on the totality of the evidence (both the plaintiff's and defendant's evidence), where the probabilities of the case lie.

THE MATERIAL FACTS

[9] The material facts on the pleaded case begin with the signing of the SPA which was drafted by an advocate and solicitor (Mohd Maydien bin Tapil Ahmad), a friend and fellow director of the defendant in PPB. The lawyer is now deceased. As commented earlier, the payment of the purchase consideration of RM1,920,000 was allegedly paid by the plaintiff by bank draft made payable to Petra Resources Sdn Bhd on the express instruction of the

defendant. These events occurred in 1999.

Listing exercise

[10] PRSB underwent a listing exercise sometime in August 2000 thereafter, and by virtue of a share swap, the PRSB shares were converted into Petra Perdana Bhd shares in a defined proportion. See exh P15 (p 166 of PBD1) for the detailed calculation. The initial share swap was done on the basis of 1 PRSB share for 2.084651 PPB share.

[11] These converted shares have allegedly been increased through a number of rights and bonus issues and share split, such that the total number of PBB (now renamed Perdana Petroleum Bhd) shares now being claimed by the plaintiff is 10,006,320.

Dividend payment

[12] On the pleaded case, there does not appear to be any significant events alluded to by the plaintiff between 1999–August 2009. The plaintiff has produced the document dated 6 August 2009 (p 96 of PBD1) headed 'Total Shares Held under Tengku Ibrahim'. This important document explains that the total shares held under Tengku Ibrahim ('TI') and 'TI companies' to be 38,415,408 shares. Out of this number, the document acknowledges that Tengku Ibrahim held 12,522,821 shares for 'RL' (Robert Lee) and 14,418,699 shares were held 'under TI for others/KTB'. This document also provides for the total dividend due to TI, RL and 'others/KTB'. On its face the document appears as a document which is confirmed by Tengku Ibrahim, Henry Kho and Robert Lee. Henry Kho, namely Henry Kho Poh Eng, is the plaintiff's son.

[13] There is evidence in the form of exh P35 (which appears on p 95 of PBD1) to show that a sum of RM216,280 as dividend was paid to the plaintiff by a personal cheque of the defendant. The cheque is dated 15 September 2009.

Demand for transfer

[14] On the evidence, there does not appear to be any demand which was made by the plaintiff to the defendant to transfer the shares purchased until November 2009. This much can be gathered from the answer provided by the plaintiff himself in Q&A 30 in his witness statement where his states:

> The first time I demanded the Defendant to transfer the shares claimed was when I met the Defendant, Dato' Koh and Robert at the Lounge of Mandarin Oriental Hotel at Kuala Lumpur or on 9.11.2009. My son also acted as an Interpreter

because l only speak Mandarin and cannot understand both English and Malay language very well. This meeting was requested by me but the venue was chosen by the Defendant.

[15] According to the plaintiff's version of the facts, at that meeting the defendant acknowledged the SPA and did not deny that he held the shares being claimed in trust for the plaintiff. The plaintiff asked for the return of his shares by the defendant who told him that he (the defendant) did not have the documentation and he needed time but provided the assurance that he would transfer all the shares to the plaintiff and told him not to worry.

Meeting and audio recording

[16] The plaintiff allegedly tried to contact the defendant several times thereafter, but did not receive any answer. The plaintiff then made the decision to go to Kuala Lumpur to meet the defendant personally. The second meeting at the defendant's office then followed on 14 December 2009 during which the plaintiff, the defendant and Soon (PW2) were present. Soon apparently was called to attend by the defendant for him to act as an interpreter.

[17] There is an audio recording of this meeting and a written transcript of it. The audio recording itself has been tendered as evidence in compact disc form as exh P11, whilst the transcript of the audio recording appears as exh P10 (found at pp 97–109 of PBD1).

[18] It is important to note that this audio recording was done surreptitiously by Soon without the knowledge of the defendant by what appeared to be by the use of a wrisfwatch recording device, purchased, according to the witness, in southern China. The defendant has described this recording as a set-up. Soon, however, has explained why he recorded the conversation in this manner, it was to avoid any possible misunderstanding and to protect his position as an impartial person in this context.

[19] At that meeting in the defendant's office, the defendant requested for a copy of the SPA, with the transcript recording at p 1 of PBD1 the following:

> Tengku If there is an agreement, I cannot run away from It. I need to see just want me to take a piece of paper and write it I cannot do that …
>
> Tengku So bring it up to date … So I need ta see the copy and only then I can write a letter for him in reference to the agreement …

'The defendants alleged admission'

[20] A copy of the SPA was subsequently supplied to the defendant, and on

23 December 2009 the defendant wrote a letter to the plaintiff, which appears as exh P2(b), p 110 of PBD1. In the course of the submission this particular letter figured prominently in the plaintiff's case, with counsel for the plaintiff describing it as 'defendant's admission'. This is what the letter says:

> Mr Kho Tian Boo
>
> December 23 2009
>
> Lot 1829, Krokop Main Road
>
> Lorong 10, Krokop,
>
> 98000 Miri
>
> Sarawak.
>
> Dear Mr Kho,
>
> Re: Petra Resources Sdn Bhd Shares
>
> With reference to the agreement made between myself, Tengku Ibrahim Petra (IC number: 551017- 03- 5359) and yourself, Mr Kho Tlan Boo (IC number. 300606-13-5175) dated December 27 2009, I hereby knowledge that I am still in possession of the 400,000 Petra Resources Sdn Bhd's shares that were purchased from me by you.
>
> I would hold on to these shares until such lime when you give me the instruction to transfer the said shares to your name.
>
> Yours faithfully,
>
> (signed)
>
> Tengku Ibrahim Petra

[21] The plaintiff promptly replied to this letter on 28 December 2009, and in this letter expressly requested the defendant to transfer all the 10,400,614 Petra Perdana Bhd shares to him on or before 6 January 2010. enclosing therewith the details of the calculation to justify the demand for the 10,400,614 shares. This letter in reply appears on pp 111–112 of PBD1 as exh P2(a). It is a fairly short letter, and I reproduce the relevant parts:

> Dear Tengku,
>
> Re-: Transfer Back of Shares
>
> I refer to your letter dated 23rd December 2009 wherein you acknowledge that you are still in possession of the 400.000 Petra Resources Sdn Bhd shares belonging to me pursuant to an agreement signed between us on 27.12.1899. I note that there is a typographical error in relation to the date of the said agreement, as confirmed by you vide our telephone conversation on 23rd December 2009 afternoon.
>
> Further to the acknowledgement and pledge in your said letter, I hereby request to kindly transfer all the 10,400,614 Petra Perdana Bhd shares resulting from the said 400,000 Petra resources Sdn Bhd shares to me on or before 6m January 2010. The details of calculation of the resultant Petra Perdana Bhd shares is per attached …

The formal demand

[22] It is common ground that there was no reply to this letter. What followed next was a letter of demand from the plaintiff's solicitors dated 7 January 2010, demanding an immediate transfer of the shares to the plaintiff on or before 8 January 2010, with the express notice given that the plaintiff would initiate legal proceedings to recover the shares in the event this was not done.

[23] Again, there was no reply to the legal demand.

THE DEFENDANT'S ARGUMENTS

[24] In his reply, the defendant has denied that there was payment of the purchase consideration. He has also explained away the letter that he wrote on 23 December 2009 as a 'mistake'. The defendant has however not denied that he signed the SPA. He has also not denied that he is holding shares allegedly for the Kho family, principally for Dato' Kho. Nor has he challenged the accuracy of the transcript of the audio recording. The main attack on the plaintiff's case has been through the accounting records as stated earlier above.

[25] The defendant has attacked this instant proceeding as having been made for collateral purposes, namely to ensure the Kho family would secure the voting rights on the shares being claimed to oust him as the chief executive officer and director of the company at the Emergency General Meeting of PPB called upon a special requisition. This was the subject matter of an injunction application in early January 2010. I had granted an interim ex parte injunction at the outset, but at the inter partes stage, and upon hearing the arguments of the parties, I had maintained the injunction only to the extent of ordering an embargo on voting on these disputed shares by both parties, until the ownership issue is resolved at trial.

EVALUATION OF THE EVIDENCE

[26] As indicated earlier, I have given special consideration to the arguments of the defendant based on the accounting records, and the vigorous attempt by counsel for the defendant to demonstrate to this court that the accounting records produced in fact show that the bank draft for the sum of RM1,920,000 paid to Petra Resources Sdn Bhd was a repayment for advances taken by the plaintiff himself. The plaintiff allegedly took advances from PRSB to the tune of RM2,458,200, with refunds being made in the sums of RM520,000, RM1,920,000 and RM18,200. These accounting records was sought to be explained by the testimonial evidence of Soon through cross-examination, but this witness evidently has no personal knowledge of these documents, not

being the author or the person supervising the making of these documents at the material times. Soon himself confirmed Ms Tan was the senior accounts supervisor who was overall in charge of accounting matters then.

[27] At the end of the day, the attempt by the defendant's counsel is reduced to deductions made from documents which have been admitted in evidence purely as Part B documents, where the authenticity is not challenged but the accuracy and truth of the contents are made subject to cross-examination. In such circumstances, the weight to be attached to these documents can only be slight, unless the author or the person having personal knowledge of the documents is called as a witness. Ms Tan, the senior accounting supervisor at the material times, could and should have been called by the defendant to explain these documents. Whilst it is true that Ms Tan was in the plaintiff's witness list earlier and the plaintiff has chosen not to call this potential witness, there is nothing in law to prevent the defendant himself from calling this witness. After all, the burden on proving that the defendant himself did not take any advances from the company, and in this regard the ledger entries were reversed, lies on the defendant by virtue of s 103 of the Evidence Act 1950. The defendant has failed to do so and hence as a matter of proof of this particular issue, I find that the defendant has not succeeded in discharging his burden of proof under s 103 of the Evidence Act 1950, although admittedly the ultimate burden lies on the plaintiff by virtue of s 101 of the said Act.

FINDINGS

[28] Evaluating the total circumstances of the case and the evidence adduced before this Court, in particular the documentary evidence, I tend to agree with the position taken by counsel for the plaintiff that the evidence in favour of the plaintiff's case is overwhelming to the extent that the failure of the plaintiff to complete his cross-examination cannot be regarded as fatal on the question of proof of this case. This being a matter of contract based on the sale and purchase agreement for the sale of the 400,000 PRSB shares, it is to the contract that any court must first and foremost address. The defendant has not challenged the authenticity of the contract and therefore regard must be had to the all important provisions of in the contract which provides that the plaintiff shall upon execution of the contract pay directly to the defendant consideration as full payment 'the receipt of which the vendor hereby expressly acknowledges'. See cl 5.2 of the sale and purchase agreement. The agreement is dated 27 December 1999. The bank draft from Eon Bank is dated 28 December 1999. There is sufficient contemporaneous connection between the two documents so as to satisfy cl 5.2. To this extent I agree with the submission by plaintiff's counsel that cl 5.2 cannot be contradicted or varied by extrinsic evidence by reason of ss 91 –92 of the Evidence Act. To this extent, I find that the plaintiff's counsel's submission based on *Macronet Sdn Bhd v RHB*

Bank Sdn Bhd [2002] 3 MLJ 11 relevant. The sale and purchase agreement contains an 'entire agreement clause' in the form of cl 10.5, which reads that the agreement 'embodies the entire understanding of the parties and there are no express or implied terms, warranties or conditions other than those contained herein'. Sections 91 –92 of the Evidence Act should therefore be applied. Of course it is accepted on the law that despite an admission in a deed that consideration has been received, it will still be open to the vendor to prove that it has not been actually paid, which is a proposition advanced by the defendant, based on *Ganam d/o Rajamany v Somoo s/o Sinnah* [1984] 2 MLJ 290 and *Lin Ah Moy v Lee Cheng Hor & Ors* [1970] 2 MLJ 99. Nevertheless, it will require fairly convincing evidence in these circumstances to disprove the admission of payment in the agreement itself and displace the applicability of ss 91–92of the Evidence Act, particularly s 92 which provides that 'no evidence of any oral agreement or statement shall fee admitted … for the purpose of contradicting, varying, adding to, or subtracting from its terms'. In the totality of the evidence and the probabilities of the case, I am not satisfied the defendant has sufficiently provided such proof.

[29] On the evidence presented, there are the statements made by the defendant himself in the transcript of the audio recording to establish that he was holding shares for Henry Kho and the plaintiff, although he was not then sure the number of shares he was holding for the plaintiff. That is why the defendant wanted a copy of the SPA to be supplied to him. That was done and he personally wrote and sent a letter acknowledging that he was still in possession of the 400,000 Petra Resources Sdn Bhd's shares that he had purchased from the plaintiff, even stating to the extent that he would hold on to the shares until such time the plaintiff gave him the instruction to transfer the shares to the plaintiff. Tested against the contemporaneous events and particularly the audio recording and the transcript thereof, the argument by the defendant that he wrote the letter through misapprehension or mistake becomes particularly unconvincing. As a seasoned businessman, a former senior member of the Malaysian Consulate in Los Angeles and generally a welt-educated person, this letter of 23 December 2009 cannot be simply explained away as a mistake or a misapprehension. Further, when subject to the vigorous cross-examination by the plaintiff's counsel, the defendant in fact agreed that he was holding the shares as constructive trustee and resulting trustee; see pp 18–20 of the notes of evidence oh 14 February 2012. The repair attempted during re-examination to explain why he admitted to holding the shares as constructive trustee and resulting trustee, ie that he was under the impression that the question posed to him by the plaintiff's counsel was in relation to his state of mind in December 2009 is, with respect, also unconvincing. The evidence remains that there is an express acknowledgement of a trust relationship in the document dated 6 August 2009 evidencing the dividend payment to the plaintiff, and the personal cheque that the defendant wrote in favour of the plaintiff, in the form of exh P35.

[30] Why else would the defendant personally write a cheque to pay a dividend payment to the plaintiff unless he was holding shares in trust for the plaintiff?

[31] On the facts of this case, the trust created is not so much a resulting but a constructive trust, where a vendor has sold the shares to the purchaser who has paid for the shares and yet retains title to it. See eg *Takako Sakao(f) v Ng Pek Yuen(f) & Anor(No 2)* [2010] 2 MLJ 181; [2010] 1 CLJ 381. It is a situation where equity in the circumstances of the case fastens upon the conscience of the holder of the property a trust in favour of another.

[32] The evidence in favour of the plaintiff, being overwhelming, the argument that an adverse inference should be drawn against the plaintiff for failing to call his sons as witnesses will have slight effect, even assuming such an adverse inference should be drawn, the burden under s 103 being on the defendant in respect of the issues raised in the accounting documents produced.

DECISION

[33] In the total circumstances of the case and on the evidence and the law, I am therefore allowing the plaintiff's claim in respect to the sale of the 400,000 shares in Petra Resources Sdn Bhd under the SPA dated 27 December 1999. The total number of PPB shares being claimed is however 10,006,320 shares constituting 3.36% of the issued share capital of PPB, which is the combined result of the share swap upon listing, the rights issues as well as the bonus issues declared from 16 August 2000–15 November 2006, and a share split exercise on 20 July 2004. On the basis of the calculation found on p 112 PBD1, the share swap from the listing exercise resulted in the acquisition of 833,860 shares in PBB. Coupled with a rights issue of 1:1, the total number of shares upon listing became 1,667,720 shares. On the evidence before me, I cannot find any document to prove payment for the numerous rights issues, and the calculation of the bonus issues and the share split will depend on the taking up of the rights issues as well. The penultimate figure of 10,006,320 shares has been based on the assumption that the plaintiff paid for the rights issues. I am therefore recording judgment for the declaration in prayer (a), para 16.1 of the statement of claim only for 833,860 PPB shares to read:

> (a) Suatu perisytiharan bahawa Defendan memegang saham Petra Perdana Berhad ('PPB') dalam jumlah 833,860 setakat 28.12.2009 dan apa-apa jumlah saham PPB kepunyaan Plaintif yang didaftarkan dalam nama Defendan setakat tarikh penghakiman Mahkamah yang mulia ini sebagal pemegang amanah bagi pihak Plaintif

[34] Prayers (b) of para 16.1 and the prayer in para 16.2 will therefore also require the necessary consequential amendments to reflect the terms of prayer (a). I am maintaining the prayer in para 16.3 since it will assist in calculating the exact number of shares presently held on trust by the defendant for the plaintiff and to determine whether the plaintiff has paid for ail or any of the rights issues.

ORDERS AND JUDGMENT

[35] I am thus entering judgment in terms of the following orders:

(a) *suatu pengisytiharan bahawa —*

(i) *defendan memegang saham Petra Perdana Bhd ('PPB') dalam jumlah 833,860 dan apa-apa jumlah saham PPB kepunyaan plaintif yang didaftarkan dalam nama defendan setakat tarikh penghakiman mahkamah ini sebagai pemegang amanah bagi pihak plaintif;*

(ii) *plaintif merupakan pemilik sah dan pemilik benefisial jumlah saham 833,860 tersebut dan apa-apa jumlah saham PPB kepunyaan plaintif yang didaftarkan dalam nama defendan setakat tarikh penghakiman mahkamah ini sebagai pemegang amanah bagi pihak plaintif setakat tarikh penghakiman mahkamah ini;*

(b) *suatu perintah pelaksanaan spesifik bahawa defendan memindah milik kepada plaintif dalam tempoh tujuh hari dari tarikh penghakiman mahkamah ini, jumlah saham 833,860 tersebut;*

(c) *suatu perintah bahawa defendan mengikrarkan dalam tempoh 21 hari dari tarikh penghakiman ini, suatu afidavit untuk mendedahkan secara terperinci, kesemua dividen, bonus, terbitan hak dan/atau keuntungan (profit) yang diperolehi defendan daripada jumlah saham 833,860 tersebut dan apa-apa jumlah saham PPB kepunyaan plaintif yang didaftarkan dalam nama defendan setakat tarikh penghakiman mahkamah ini sebagai pemegang amanah bagi pihak plaintif dari tarikh 27 Disember 2009 sehingga tarikh perintah mahkamah ini;*

(d) *membayar plaintif ganti rugi yang ditaksirkan oleh mahkamah ini di mana ganti rugi ditaksirkan akan mengambil kira, antara lain, isi kandungan afidavit tersebut;*

(e) *suatu perintah bahawa defendan membayar faedah pada kadar 5% ke atas ganti rugi ditaksirkan dikira dari tarikh pemfailan tindakan ini sehingga tarikh pembayaran sepenuhnya ganti rugi ditaksirkan kepada defendan;*

(f) *kos untuk ditentukan dibayar oleh defendan kepada plaintif;*
and

(g) *pihak-pihak diberikan kebebasan untuk membuat apa-apa permohonan kepada mahkamah ini yang difikirkan wajar dan adil selanjutnya* ('liberty to apply').

[36] Orders and judgment to be entered accordingly.

Claim allowed.

Reported by Ashok Kumar